BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LATOSHA N. ACKERMAN	)	
Claimant	)	
	)	
VS.	)	
	)	
CREEKSTONE FARMS PREMIUM BEEF	)	
Respondent	)	Docket No. 1,037,971
	)	
AND	)	
	)	
COMMERCE & INDUSTRY INS. CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 24, 2008, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Robert R. Lee, of Wichita, Kansas, appeared for claimant. David F. Menghini, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of her employment on November 1, 2007, and that respondent had notice of her injuries on that date. The ALJ ordered temporary total disability compensation paid by respondent from November 9, 2007, until November 19, 2007, as well as ordering respondent to pay all claimant's medical expenses from her accident.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 24, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant's alleged injury arose out of and in the course of her employment. Respondent contends that the evidence shows that claimant's injury occurred when she lifted one of her children at home and not

as a result of a work-related accident. Respondent also contends that claimant failed to provide timely notice of her alleged accident.

Claimant argues that respondent's witnesses were not credible and that the ALJ correctly found that she was injured at work as alleged. Accordingly, claimant requests that the Board affirm the Order of the ALJ.

The issues for the Board's review are:

(1) Did claimant's injury arise out of and in the course of her employment with respondent?

(2) Did claimant provide respondent with timely notice?

FINDINGS OF FACT

Claimant worked at respondent as a strapper. She testified that on November 1, 2007, the conveyor belt broke and she was required to stack boxes that weighed from 15 pounds to 60 pounds. After she had stacked a row of 60-pound boxes, her back started hurting. She waited until noon and then informed Greg Killen, her supervisor, that she had injured her back at work. Mr. Killen took her to Health Services, where a nurse put Biofreeze on her back, gave her some Ibuprofen, and told her to go home. Later that day, claimant went to the emergency room of the hospital in Arkansas City and was given a release to return to work on November 2.

Claimant went back to work on November 2, gave the return-to-work slip to Mr. Killen and told him that she could hardly move and that it hurt to walk. She went back to Health Services. She saw another plant nurse, who put some Biofreeze on her back and had her lie down. Claimant did not work that day and went to see her personal physician, Dr. Aaron Watters. She complained of neck pain to Dr. Watters, and he sent her for an MRI of her cervical spine. She went back to see Dr. Watters on November 13 complaining of continuing back pain, especially at night, at that time. She told Dr. Watters that she thought that "work exacerbated this in the beginning and possibly some things at home."[1] Dr. Watters diagnosed her with cervical disc disease at C6-7 and recommended a 25-pound weight restriction. Claimant saw Dr. Watters again on November 20, 2007, at which time he released her to return to work on November 19, 2007, with a 25-pound weight restriction "due to injury to back 11-2-07."[2]

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[1] P.H. Trans., Resp. Ex. 2 at 2.

[2] *Id.*, Cl. Ex. 3 at 2.

Claimant returned to work on November 20 and worked that entire day. She went to work the next day but was told that she had accumulated over 36 points because of missing work, and she was terminated.

Greg Killen was claimant's supervisor at respondent. Contrary to claimant's testimony, he testified that the conveyor was not broken on November 1, 2007. He stated that early in the morning of November 1, 2007, he walked over to the strapper and saw claimant crying. She told him her back was hurting. He asked her how and where she was injured, and she told him she woke up that morning with back pain. She did not tell him that she was not able to continue lifting 30 and 60-pound boxes. He took her to Health Services, where she was seen by Lori Stewart, one of the plant nurses. Ms. Stewart also asked claimant whether she had injured her back at work, and claimant repeated that she did not have a work injury.

Mr. Killen asked claimant two times if she had injured herself at work, and both times she indicated she had not. The first time that Mr. Killen knew that claimant was alleging a work-related injury was the day before the January 24, 2008, preliminary hearing, when he received a phone call from Ms. Stewart telling him he needed to go to court.

Ms. Stewart testified that she saw claimant on November 1, 2007, soon after she arrived at work, probably between 7:30 and 8 a.m. Mr. Killen had brought claimant into the health office. Claimant was complaining of upper back pain between her shoulder blades. Mr. Killen told her that claimant said she had injured herself at home. Claimant was present during this conversation and did not disagree with that statement. Ms. Stewart specifically asked claimant if she had done something at work, and claimant told her that she had not hurt herself at work. Ms. Stewart put Biofreeze and ice on claimant's back, gave her some Ibuprofen, and encouraged her to leave work for the day and see her personal physician. She filled out a medical slip for claimant to give to her supervisor. That slip indicates claimant was seen for back pain and notes that the pain was not work related.

When Ms. Stewart got to work the next day, November 2, claimant was already in the health office with Debbie Ferguson. Claimant was tearful, and she and Ms. Ferguson were talking about claimant's visit to the emergency room the day before. Ms. Stewart and Ms. Ferguson put Biofreeze and ice on claimant's back. Claimant was again asked if she had injured herself at work, and claimant stated: "It started hurting at home when I lifted one of the kids."[3] Claimant has five children, three 7-year-olds and 19-month old twins. Her twins weigh about 23 to 24 pounds. At no time did claimant tell her that her injury arose out of her work activities.

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[3] *Id.* at 36.

Debbie Ferguson is a nurse and is also the workers compensation manager at respondent. She testified that claimant came into the health office on November 2 and said she had gone to the emergency room the day before. Ms. Ferguson put some cream and ice on claimant's back.

Ms. Ferguson's desk is right next to health services, and she overhead the conversation Ms. Stewart had with claimant the day before. She heard Ms. Stewart ask claimant if she had hurt herself at work and claimant answer that she did not. When Ms. Ferguson saw claimant on November 2, she asked claimant several times if she had a work-related injury and claimant continued to say no. Claimant indicated that she thought she hurt her back at home picking up one of the kids.

Ms. Ferguson said if an employee reports a work-related injury, an accident report is filled out before the employee leaves the health office. No accident report was filled out because claimant said her condition was nonwork-related. The first time Ms. Ferguson became aware claimant was alleging a work-related injury was on November 29, 2007.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish her right to an award for compensation by proving all the various conditions on which her right to a recovery depends. This must be established by a preponderance of the credible evidence.[4]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

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[4] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[5] K.S.A. 2007 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

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[7] *Id.* at 278.

[8] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2007 Supp. 44-555c(k).

ANALYSIS

Claimant alleges she injured her upper back while lifting boxes on November 1, 2007. She says she reported this accident and injury to her supervisor, Mr. Killen, that same day. The ALJ was persuaded by this testimony and so found in his January 24, 2008, Order.

Mr. Killen relates a very different version of events. He denies that the conveyor belt broke on November 1, 2007. He agrees that claimant reported back problems to him and that he took her to see a company nurse at Health Services. But Mr. Killen denies that claimant ever told him that her back problem was work related. To the contrary, claimant told him that she awoke that morning with back pain. Both Ms. Ferguson and Ms. Stewart, the nurses who treated claimant at Health Services, testified that claimant related her back problem to lifting one of her children at home and that claimant specifically denied injuring herself at work. The Health Services medical slip entries dated November 1, 2007, and November 2, 2007, relate that claimant was seen for back pain that was not work related.[10] Likewise, Mr. Killen's contemporaneous "Medical Notes" reflect that claimant's symptoms began at home and that she denied any work-related injury.[11] Had claimant described her symptoms as work related, an accident report would have been completed. Claimant did not ask to be sent to a doctor but, instead, went on her own to the hospital emergency room on November 1, 2007, and then to her personal physician. Dr. Watters' office notes of November 2, 2007, refer to "back pain" and "neck pain" but make no mention of how the pain started.[12] His office notes of November 13, 2007, contain the following history: "States she thinks work exacerbated this in the beginning and possibly some things at home."[13] This history indicates that claimant is not too clear about how she injured herself. This does not correspond with her testimony at the preliminary hearing. The Ark City Clinic return-to-work note dated November 20, 2007, refers to a November 2, 2007, back injury.

CONCLUSION

None of the other witnesses nor any of the contemporaneous writings on November 1 and November 2, 2007, support claimant's testimony that she was injured lifting boxes, that her symptoms began at work, and that she reported her injury as being work related on November 1 and November 2. Claimant has failed to meet her burden of proof that she was injured at work on November 1, 2007.

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[10] P.H. Trans., Resp. Ex. 1.

[11] *Id.*, Resp. Ex. 2 at 2.

[12] *Id.*

[13] *Id.*

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated January 24, 2008, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March, 2008.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
David F. Menghini, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge